

# IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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## COMPLETE TITLE OF CASE

FREDERICK SPENCER,

Appellant,

v.

GEORGE LOMBARDI, et al.,

Respondents.

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**DOCKET NUMBER** WD79134

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** October 4, 2016

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## APPEAL FROM

The Circuit Court of Cole County, Missouri  
The Honorable Jon E. Beetem, Judge

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## JUDGES

Division Two: Mitchell, P.J., and Martin and Witt, JJ.

CONCURRING.

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## ATTORNEYS

Frederick Spencer  
St. Louis, MO

Appellant, *pro se*,

Chris Koster, Attorney General  
Emily A. Dodge, Assistant Attorney General  
Jefferson City, MO

Attorneys for Respondents.

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## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

**FREDERICK SPENCER,**

**Appellant,**

**v.**

**GEORGE LOMBARDI, et al.,**

**Respondents.**

**OPINION FILED:  
October 4, 2016**

**WD79134**

**Cole County**

**Before Division Two Judges:** Karen King Mitchell, Presiding Judge, and Cynthia L. Martin and Gary D. Witt, Judges

Frederick Spencer, previously an offender in the custody of the Missouri Department of Corrections, appeals from the trial court's dismissal of his action brought under 42 U.S.C. § 1983 against Department Director George Lombardi, as well as the individual members of the Board of Probation and Parole ("Board"). Spencer argues that Lombardi and the Board unlawfully extended Spencer's conditional release date from prison when he failed to complete the Missouri Sex Offender Program ("MoSOP") due to Spencer's refusal to accept responsibility for his actions. The trial court dismissed the action, holding that the members of the Board were entitled to absolute immunity, that Spencer failed to state a claim against Lombardi, and that all of the claims were barred by the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994).

**AFFIRMED.**

**Division Two holds:**

1. A term of imprisonment includes both prison and conditional release terms. "Conditional release" means the conditional discharge of an offender by the Board, subject to conditions of release that the Board deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the state board of probation and parole.

2. In order to be conditionally released, an offender who has been convicted of a sexual offense must complete MoSOP, which requires the offender to acknowledge guilt, which Spencer refused to do. The failure to complete MoSOP caused the Board to cancel Spencer's conditional release date. Spencer served out his entire prison term without being conditionally released.
3. A court must begin with a review of the appellant's brief in order to determine what, if any, issues he has preserved. An appellant's argument is limited to only those errors asserted in the points relied on, and the failure to raise an argument in the point waives the argument.
4. Spencer's first point states that the trial court erred in holding that "Lombardi[] enjoyed absolute immunity." The trial court made no such holding. Rather, the trial court held that the Board members were entitled to absolute immunity. Spencer's point makes no mention of the Board members, and makes no challenge to the trial court's holding that they were entitled to absolute immunity. Accordingly, Spencer has waived any challenge as to the dismissal of the Board members on that ground, and we affirm their dismissal.
5. While Spencer's point is arguably multifarious, preserving nothing, the point adequately asserted the argument that Spencer stated a claim against Lombardi upon which relief may be granted. The court will review this claim.
6. Appellate review of a trial court's grant of a motion to dismiss is *de novo*. A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. A court reviews the petition in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. The court treats the plaintiff's averments as true and liberally grants the plaintiff all reasonable inferences, and the credibility or persuasiveness of the facts alleged are not weighed.
7. Spencer's claim that he would prove at trial that Lombardi "received sufficient and proper notice" of Spencer's allegations through various correspondence and grievances allegedly filed with Lombardi is insufficient to assert a claim against Lombardi. What Spencer might have been able to prove at trial is irrelevant to the issue of whether his petition is adequate to survive a motion to dismiss for failure to state a claim. The appellate court reviews the petition to determine if the facts alleged meet the elements of a recognized cause of action.
8. Spencer's claim accusing "all Defendants," including Lombardi, of violating Spencer's constitutional rights also fails to state a claim because Spencer's petition failed to pair these assertions of the deprivation of constitutional rights with any allegations of specific conduct by Lombardi that caused such deprivation. The bare assertion that a party has been deprived of constitutional rights is a legal conclusion, which must be supported by facts constituting the alleged violation of constitutional rights. Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights. Spencer, in making bare assertions that he has been deprived of constitutional rights, failed to

include any allegations showing how Lombardi was in any way responsible for the alleged deprivations, thereby failing to state a claim.

9. Spencer's allegation that "all Defendants" participated in the cancellation of his conditional release date fails to state a claim against Lombardi because only the Board has the authority to conditionally release inmates or to extend the dates of conditional release. Lombardi had no such authority, and it is undisputed that Lombardi is not a member of the Board. Because Lombardi could not have made, or even participated in, the decision to extend Spencer's conditional release date, it cannot be said that Lombardi caused harm to Spencer through the extension of the date.
10. A statute that allows the Board to delay an offender's "conditional release . . . for a maximum of fifteen working days to permit necessary time" for the Board to review whether the date should be extended due to conduct that "occurs in close proximity to the conditional release date" does not apply to Spencer's conditional release date, which was several months away when the Board made the decision to extend it. When conduct requiring extension "occurs in close proximity to the conditional release date," the offender's "conditional release may be held for a maximum of fifteen working days to permit necessary time" for the Board to review whether the date should be extended. In that situation, if the Board has not reached a decision "at the end of a fifteen-working-day period, . . . the offender shall be released conditionally." In other words, the Board is allowed to require an offender to remain in the custody of the Department up to fifteen days *beyond* what would otherwise have been his conditional release date if the Board is determining whether to extend the offender's release date for a violation of rules and regulations.
11. The fifteen-working-day limitation applies only when the decision to extend the conditional release date must be made in close proximity to the conditional release date. But again, the fifteen-working-day limitation never came into play because the decision to extend the conditional release date was made months prior to Spencer's scheduled release date. So the requirement to release the offender after fifteen days was never triggered.

**Opinion by: Karen King Mitchell, Presiding Judge**

October 4, 2016

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